# LIABILITY IN TORT OF CARRIERS OF THE MAIL.

The question as to the right of the owner of a parcel consigned to the mail to recover in tort for its loss or destruction, as against the carrier of such mail by contract whose servant has by negligence or misfeasance occasioned such loss, has only recently been directly passed upon by the courts.[1] Certain difficulties with which the courts seem to have been confronted in reaching their conclusions in these cases, and certain other difficulties which are likely to arise in applying the decisions announced, suggest a brief examination of the course of the decisions relating to the liability of postmasters and others who are engaged in discharging the functions assumed by the government in maintaining a post-office department.

The history of the postmaster's liability begins with the discussion in the case of *Lane* v. *Cotton*,[2] in which the views of the judges of the court of King's Bench were fully expressed, although judgment for the defendants was not entered until a year later. The case was, briefly, as follows. The plaintiff Lane, having entrusted to the post-office at London a letter containing two exchequer bills of three hundred pounds each, addressed to one Jones at Worcester, alleged that this letter with the bills contained therein was not conveyed to Worcester but was lost by the negligence of the defendants, Sir Robert Cotton and Sir Thomas Frankland, who had been appointed jointly as postmasters-general of England, and their servants. There were special findings in the case in favor of the plaintiff on these allegations. It appeared that the letter was delivered at the London post-office to one Breese, who had been appointed by the defendants to receive the letters at that office; and it is plain from the opinions of the justices that if there was any negligence, it was that of Breese, who was appointed by the postmasters-general under authority of the statute to discharge the duties which he was performing in connection with the receipt and custody of the letter. The question submitted to the court was whether the action would lie against

[1] Bankers' Mutual Casualty Co. *v.* Minneapolis, etc., Ry. (C. C. A. 1902) 117 Fed. 434, 54 C. C. A. 608, and Boston Ins. Co. *v.* C. R. I. & P. Ry. (1902) 118 Iowa, 423.

[2] (1701) 1 Ld. Raym. 646; also reported at length in 12 Mod. 472, and briefly in other reports.

the postmasters-general for the neglect and non-feasance of Breese. The case was tried before Chief Justice Holt, who reached the conclusion that the defendants were liable for the negligence of Breese, who might also be liable not only as an officer but as a wrongdoer. On a reargument before four justices of the King's Bench, three of them were of opinion that the defendants were not liable for the negligence of Breese, but Chief Justice Holt adhered to his original view as to the defendants' liability. Subsequently, a judgment was rendered for the defendants; but it is said that, upon an intimation that the plaintiff intended to bring a writ of error on the judgment, the defendants paid the plaintiff's claim.

The arguments for plaintiff and defendants and the views expressed by the justices are so pertinent to the question as to the liability in tort of a carrier of the mails that it will be interesting briefly to summarize them.[3] For the plaintiff it was contended that the office of postmaster was an ancient common law office exercisable by any person before the enactment of the Statute of 12 Car. II, c. 35, which created the office of postmaster-general with the purpose of making one public office of all the prior private ones, the end proposed being a more speedy and safe conveyance of letters. Therefore, the posts, whether private or public, should be considered as common carriers of small packets, and consequently liable as are other common carriers, to make satisfaction for miscarriage. It was further contended that the postmaster-general appointed under the Statute was charged with the duty of carrying letters consigned to post, and was answerable for his subordinates, whom he was authorized to appoint; and that, although in the letters patent issued to the postmaster-general there was a covenant that he should not answer for the default of any other person, nevertheless, such letters patent constituted only a private agreement between the King and his appointee, which agreement could not deprive the subject of a benefit which was given to him by law; reference being made to the liability of a sheriff for the negligence of his bailiff. For the defendants it was contended that the liability arising out of common law offices was not applicable to this public office created by statute, the smallness of the premium paid for the transportation

[3]The arguments of counsel, pro and con, are more fully stated in the report of the case in 12 Mod. 472 than in the report given in 1 Ld. Raym. 646; but the latter report gives more specifically the views of the Justices, and especially the views of Chief Justice Holt, dissenting.

of letters and parcels being relied upon as an argument that Parliament, in the enactment of the Statute, did not have in contemplation any such liability of the postmaster-general therein provided for. It was further contended that there was no analogy between the postmaster-general and a common carrier, as the latter had the privilege of making his own price according to the risk run, whereas the rate for the carriage of letters and parcels by post was fixed by statute. The controversy as to whether the exchequer bills were within the contemplation of the Statute, which provided for the carrying by post of "all letters and and packages whatsoever," need not be stated, for on this question the justices were equally divided.

Gould, Justice, based his conclusion that the defendants were not liable especially on the ground that Breese was as much a King's officer as were the defendants, although the defendants were more general officers, and that each was bound only to answer for himself. He suggested, moreover, that if the defendants had died, yet Breese would have continued as officer, and therefore Breese had a charge and trust of himself and was not a deputy to the defendants. He also laid stress on the nature of the office, as indicated by the general purpose of the Statute, and insisted that, since the defendants received only a salary, there was no adequate recompense to find a contract rendering the postmasters-general liable for the value of the letters or parcels received,—there being no proportion between the compensation and the hazard.

Powys, Justice, agreed that if such an office had been erected at common law by a private man for gain, an action would have lain at common law for a miscarriage; but he observed that Parliament in setting the price for carriage had regard only to the size and weight, and not to the value, from which he inferred that Parliament did not intend that the postmaster-general should be answerable for the value of packages lost in the post. But he thought that an action would lie against Breese who had received the letter, on the theory that the inferior officers were servants of the King and not of the defendants, their wages being paid out of the returns of the post-office and security being taken of them in the name of the King. He believed, however, that it would be otherwise if the office had been farmed.

Turton, Justice, made the rather irrelevant suggestion that an action would not lie against the custodian of records for so negli-

gently keeping such records that a record was lost, "because other clerks beside his had access to the office;" but he agreed in general with Gould and Powys.

Chief Justice Holt's dissent was stated at great length. He not only undertook to answer the objections of the other justices to the right of recovery by the plaintiff, but discussed *seriatim* various other objections, no doubt for the purpose of meeting the arguments of defendants' counsel. His main points, however, may be sufficiently summarized for present purposes as follows. First, the postmaster-general is by the Statute intrusted with the interest and property of the subject, and charged with the duty of safely keeping at his peril all letters confided to his custody; and the Chief Justice urge the analogy of the marshal or warden of a prison who is obliged safely to keep the prisoners at his peril. Second, the owner of the letter pays a premium for its carriage in pursuance of an employment which the postmaster-general has accepted; and to the objection that the office was founded by the government, he answered that it was immaterial whether it was founded by the statute law or the common law. As to the objection that the charge ought to be in pursuance of some sort of contract, he denied that any contract was necessary, considering the duty of the office in itself sufficient to impose the obligation; and he further contended that the defendants received a salary, and the case was therefore like that of the master of a ship accepting goods for transportation, and analogous to that of an innkeeper who is chargeable for goods in his custody. His main contention, however, was that Breese had been appointed by the defendants and was removable by them, though they did not pay him his wages. But, on the other hand, if Breese was not a servant of the defendants, the defendants were still liable for his wrong, as that of a stranger for whose acts they had assumed liability by undertaking the duties of their office.

The case of *Lane* v. *Cotton,* then, stands for the proposition that the postmaster-general of England, and by necessary application of the line of reasoning, any postmaster, is a public officer, not accountable for the misconduct of subordinates, who, though they may be appointed by him, are officers of the postal department. This proposition was reannounced seventy-five years later in the case of *Whitfield* v. *Lord Le Despencer,*[4] in which the plaintiff sought to recover against the postmasters-general of England the

[4](1778) 2 Cowp. 754.

value of a banknote for one hundred pounds which he had sent in a letter lost in the mail. There was a special finding that plaintiff's letter was delivered into the general post-office in London, and with the banknote enclosed came to the hands of one Michell, a sorter of letters, appointed by defendants and paid out of the revenues of the office, who had given security and taken an oath for the faithful discharge of his duties; and that the said Michell feloniously secreted plaintiff's letter and stole the banknote therefrom, for which offense he was tried, convicted and executed. The question most elaborately argued was as to whether Michell was the servant of the public, that is, an officer of the department, or whether he was the servant of the defendants. Lord Mansfield, delivering the opinion of the court, re-examined the question as to the state of the law prior to the decision of the case of *Lane* v. *Cotton,* and reached the conclusion that from the nature of his employment Michell was a public servant for whose misconduct the defendants were not liable. He was satisfied, therefore, to render a judgment for the defendants on the authority of *Lane* v. *Cotton,* which he said had been acted upon as law by Parliament, the post-office department, and the people. The decision might well have been rested, however, upon the language of a statute passed after the decision in *Lane* v. *Cotton,* embodying the exemption from liability of the postmaster-general, which in the case of Lord Cotton and his associate was embodied only in the patent to the office.

The distinction between the rule of liability of a public officer for the misconduct of subordinate officers, and that of a corporate body for the misconduct of its servants was pointed out in the case of *The Mersey Docks and Harbour Board, Trustees,* v. *Gibbs,*[5] in which the cases of *Lane* v. *Cotton* and *Whitfield* v. *Lord Le Despencer* were commented upon. In this case it appeared that the defendants (plaintiffs in error) were incorporated by act of Parliament for the purpose of maintaining certain public docks, and that plaintiff's vessel was, by reason of a mud bank, injured in approaching such docks. It was not contended that the trustees personally had knowledge of the unfit condition of the approach to the docks; but it was insisted that they were charged with such knowledge through their servants and were therefore liable for failure to take reasonable care that the entrance to the docks should be kept in a safe condition for use. On an appeal by the trustees

[5](1864) L. R. 1 H. L. 93.

from a judgment in which they were held liable for the damages suffered by the plaintiff, the judges ruled that the trustees were not public officers, but constituted in effect a public corporation, charged with a duty involving a liability for the negligent maintenance of these public works. The cases as to the postmasters-general were distinguished on the ground that the latter were public officers, servants of the government, entrusted with the management of a branch of the government business, and not responsible for the negligence or default of those in the same public employment as themselves.

Finally, the cases as to the liability of the postmasters-general were followed in *Bainbridge* v. *Postmaster-General*,[6] which was an action for personal injuries received in consequence of the negligent displacement of a foot-way for the purpose of repairing a telegraph cable. The negligence was that of an engineer employed by the post-office department in its function of maintaining the postal telegraph line; and the attempt to distinguish the early postmaster-general cases was based on the contention that the statute establishing the postal telegraph conferred upon the postmaster-general a corporate function, instead of an official duty with reference to the business transferred to him. This contention was denied, and the exemption of the defendant from liability was based on the conclusion that the functions of the postmaster-general as to the public telegraph were analogous to those which he exercised with reference to the mail service.

The doctrine of the cases above noticed has been uniformly followed in this country, with the result that any officer of the post-office department, whether superior or inferior, is liable to the owner of mail-matter for injury due to his own personal default in the discharge of his duties, but not liable for the default of a subordinate officer or servant in the public employment. Thus, in *Keenan* v. *Southworth*,[7] a postmaster was held not liable to the sender of a letter for its loss by the negligence of a clerk in his office, the brief statement being "that the postmaster-general, the deputy postmasters, and their assistants and clerks, appointed and sworn as required by law, are public officers, each of whom is responsible for his own negligence only, and not for that of any of the others, although selected by him, and subject to his orders."

[6] [1906] 1 K. B. 178 (C. A. 1905).

[7] (1872) 110 Mass. 474.

In *Raisler* v. *Oliver*[8] the same proposition is announced, but with the limitation that it is applicable for the exemption of a postmaster from liability for the defaults of his clerks and assistants only where they "are appointed in pursuance of some law expressly authorizing it, so that by virtue of the law and the appointment, the appointees become in some sort public officers themselves." Under this qualification the court sustained a judgment against the defendant postmaster, on the ground that it did not appear in the record that the clerk whose negligence caused the loss of registered letters was an employee of the department rather than a private clerk or assistant paid by the postmaster out of his own salary or means.

These cases have been discussed at some length for the purpose of making clear a distinction which must be taken between the case of a postmaster sought to be charged for the default of a subordinate in the public service, though appointed by him, and the case of a carrier of mail under contract sought to be charged for the results of the negligence of a servant who is not in any way accepted by the post-office department, or recognized as being in the service of that department.

The failure to make such distinction misled the Supreme Court of Ohio, in *Conwell* v. *Voorhees*,[9] into holding that the owners and proprietors of a stage coach who had contracted for the carriage of United States mail, were not liable to the owner for loss of a letter containing money, on the ground that such contractors were public agents, not responsible for the omissions, negligence or misfeasance of those employed under them; and having employed trustworthy persons of suitable skill and ability, they had not cooperated in the wrong. This case was followed in *Hutchins* v. *Brackett*,[10] in which it was assumed that the English postmaster cases were controlling; but the point was not really involved, for it appeared that the servant who lost the letter was in fact a mail-carrier, presumptively, as it would seem, recognized by the post-office department as a proper person to carry the mail under its authority.

These two cases, however, were criticised and their defective reasoning pointed out in *Sawyer* v. *Corse*,[11] which involved the liability of a contractor carrying the mail for loss of a letter

[8](1892) 97 Ala. 710.

[9](1844) 13 Ohio, 523.

[10](1850) 22 N. H. 252.

[11](Va. 1867) 17 Gratt. 230.

containing bank-notes, due to the negligence of his private agent or servant, it appearing that such servant was selected, employed and paid by the contractor, was under his direction and control, worked for his benefit and profit, and could be discharged by him at pleasure. The court reasoned that though the contractor "may be said to be in a certain sense an agent of the government because he is engaged in working for the government, yet the laborers and others whom he employs under him in the execution of his contract cannot be said to be agents of the government, which does not know them, does not appoint them, does not control them, does not pay them, and has nothing to do with them."

The Supreme Court of Mississippi in *Foster* v. *Metts*,[12] very clearly misconceived the distinction made in the case of *Sawyer* v. *Corse* between the private servant of a contractor and a subordinate in the government's employ, for it expressed its disapproval of the latter case, favoring the views expressed in *Conwell* v. *Voorhees* and *Hutchins* v. *Brackett*, although the facts under consideration involved the liability of a contractor for loss of a letter stolen by a government mail-carrier; at least, that is the inference suggested by the statement of the court that a carrier of the mails is required to be of a certain age, take a certain oath, etc., and is subject to discharge by any postmaster under certain contingencies. Such a carrier is of course a "subordinate agent of the government, whose employment is contemplated and provided for by the government in contracting to have the mail carried," and the rule that postmasters are not liable for defaults of their subordinates was therefore applicable.

Apparently the first case of a suit involving the liability of a railroad company, as a carrier of mail, to the owner of mail-matter for its loss or destruction due to the negligence of the servants of the company, is that of *Central R. & B. Co.* v. *Lampley*,[13] decided by the Supreme Court of Alabama. The plaintiff, Lampley, sued the defendant company to recover damages for the alleged conversion of $225 in money, which the plaintiff had sent by mail enclosed in a registered letter which had never reached its destination. It appeared that the pouch containing the letter was strapped and locked by the postmaster and delivered to an employee of the defendant, the custom of the post-office at that time being to deliver mail pouches to and receive them from the

[12] (1877) 55 Miss. 77.

[13] (1884) 76 Ala. 357.

employees of the defendant. It is clear from the testimony that this employee was merely a train-hand or porter, and that the mail while being carried on defendant's train was not in charge of any route agent or official of the post-office department, the pouches being placed in the baggage-car. The conductor, who seems to have been the only person on the train charged with any duty regarding the mail pouches, was not a postal official. Judgment having been rendered against the railroad company for the loss of the money in the registered letter, the Supreme Court, on appeal, held that the action for conversion would not lie and reversed the judgment, saying that there was no evidence tending to show that the defendant was guilty of any wrongful disposition or appropriation or withholding of the letter other than the failure to deliver on the commencement of the suit. On the general proposition as to whether the defendant would be liable for loss of the letter by the negligence or want of care of defendant's servants, the court approved of the doctrine announced in *Sawyer* v. *Corse,* on the theory that the employees of the railroad are its private servants not engaged in the government employment, and it noticed with disapproval the cases of *Conwell* v. *Voorhees* and *Hutchins* v. *Brackett* which have already been commented upon. There was also some consideration in this case of the question whether the railroad company was, with regard to the mail thus carried, a common carrier of goods, and the suggestion was made that its liability in this respect was only that of bailee for hire.

Following the chronological order of decisions as well as relevancy of subject matter, we must next consider the English case of *"The Winkfield."*[14] A collision occurred between the steamship "Mexican," carrying the British mails for South Africa, and the steamship "Winkfield," resulting in the loss of the former with a portion of the mail which she was carrying. In proceedings in the Admiralty Court, to determine the liability of the owners of the "Winkfield" for the damages sustained by the "Mexican" and all other claims for damages resulting from the collision, the court allowed claims of the postmaster-general of England for the value of letters and parcels in respect of which the parties interested had made claims upon him and given him written authority to represent them in these proceedings; but it refused to allow his claim for letters and parcels in respect of which no claims had been made or instructions received from the senders

[14] [1902] P. 42 (C. A. 1901).

or addressees, although the postmaster-general undertook to distribute the proceeds among them. On appeal from the disallowance of the latter claims, it was held in the Court of Appeals that the postmaster-general stood in the position of bailee for the owners of letters and parcels sent by the mail and, as such bailee, was entitled to recover the value of property lost through the negligence of the defendants, thus overruling the case of *Claridge* v. *South Staffordshire Tramway Co.*,[15] in which it was held that as against a wrongdoer, the bailee could only recover the damage to his interest in the property, leaving the bailor to sue for his own loss. The court discussed at length the nature of the bailee's right in the property intrusted to him, and reached the conclusion that his right to recover for its loss or injury did not rest upon his liability over to the bailor but upon his possession,—the duty to account to the bailor for the amount of the recovery, over and above the value of his own interest as a bailee, being a consequence of his having acquired a claim which was in his hands a substitute for the lost property. The significance of this decision, so far as it relates to mail-matter, is that as to such matter the post-office department stands toward the owner as bailee, authorized to contract with reference to its transportation and, on behalf of its owner, to recover damages from any person who, either by breach of contract or by tort, has caused an injury to such owner. Under this theory, a contractor for the carriage of mail, to whom mail-matter is delivered for transportation,—full custody and possession of the matter being given to the carrier, and not to a servant of the department accompanying it during the transportation,—is a bailee of the department, and liable to respond to the department, not only for breach of contract of transportation, but also in tort for negligence resulting in damage or loss.

It is quite true, as was suggested in *Foster* v. *Metts* and *Central R. & B. Co.* v. *Lampley, supra,* that a carrier of mail, although engaged otherwise in the business of common carrier, is not a common carrier as to the mail he transports, but only a private carrier subject to the liability involved in that form of bailment; for the carriage of the mail is not one of the functions which a public carrier of goods holds himself out to perform. It is equally true, as suggested in those cases, that there is no privity of contract between the carrier of the mail and the owner who confided it to the department for transportation. But, evidently, neither

[15] [1892] 1 Q. B. 422.

of these considerations relieves a carrier of the mail under contract from liability in tort to the department, as bailee of the owner, for loss of or injury to such mail in course of transportation. If the owners of the "Winkfield," who had assumed no duty whatever to the department with reference to the mail, were held properly chargeable for negligence in the management of the ship which resulted in loss of the mail in the possession of the department's bailee, certainly this bailee himself must be liable for any negligence which should result in similar loss. It would further appear that if the distinction taken in *Sawyer* v. *Corse,* between inferior postal officers or agents and private employees of a postal officer or agent who are not accepted or recognized by the government as under its control and direction, is sound, then a carrier of the mail under contract is liable for the torts of his servants who are not in any way connected with the postal service and who owe no special duty to the department by reason of relation to it, but owe duty only to the contractor as employer. It may also be suggested that, even when the mail-matter being transported by the carrier is in the possession and control of an officer or agent of the department so that possession has not passed to the carrier as bailee, nevertheless the carrier must respond in damages for tort if, through his wrongful act or that of his employee or servant not engaged in the service of the department, injury or loss occurs; for as to such matter he has assumed a relation necessarily involving a duty of care, and breach of this duty would constitute a tort.

A discussion of the question whether a carrier of the mail might, by contract with the department, relieve himself from this liability or limit the extent thereof, and whether such contract, if valid as between himself and the department, would also be binding as against the owner of the mail matter, is not here contemplated. It is sufficient for present purposes to seek a solution of the question as to liability in tort without reference to contractual limitations of such liability.

To use a hypothetical case for illustration of the principles involved in the cases now to be considered, would a contractor for the carriage of the mails between the railroad station and the post-office, assuming him to have been sworn and given security as an employee of the post-office department, be exempted from liability to the owner of mail-matter for a loss due to the negligence of a driver whom he had incidentally and casually employed in driving his cart?

The cases with reference to which the foregoing suggestions have been made relate to the liability of a railroad company, engaged in carrying the mail, to the owner of a letter or parcel destroyed as a result of the negligence of its employees. The cases thus directly referred to are *Bankers' Mutual Casualty Co.* v. *Minneapolis, etc., Ry.*,[16] decided by the Circuit Court of Appeals for the Eighth Circuit in July, 1902, and *Boston Ins. Co.* v. *C. R. I & P. R. Co.*,[17] decided by the Supreme Court of Iowa in October of the same year. In the Iowa case it was assumed for the purposes of the decision that a package of money, in course of transmission by registered mail, being carried by the defendant railroad company in a mail car under contract with the post-office department, was destroyed as a result of the negligence of the employees of the defendant in the operation of the train; while in the Circuit Court of Appeals case it was assumed that a package of paper money, consigned to the mail in like manner, was lost through the negligence of a station agent of the railroad company, into whose custody the mail pouch containing it had been delivered by the agent of the department in charge of the mail car on the defendant's train. In each case the package of money was mailed by a bank, and the action was brought by an insurance company which had assured the safe transportation of the package, and now sued by right of subrogation. In each case it was conceded that the railroad employee whose negligence resulted in the loss or destruction of the package was not an agent or servant of the post-office department and had no relation to it. In each case the railroad company was held not to be liable to the owner of the package for its loss.

The line of reasoning in the Circuit Court of Appeals case was substantially this: First, no contractual relation existed between the railroad company and the owner of the package. Second, the railroad company was not a common carrier as to the package thus transported. Third, the railroad company was but an instrumentality of the government engaged in the discharge of a public function. And fourth, the station agent through whose negligence the package was lost was also engaged in the discharge of a public function, although he had not been sworn as an official or employee of the post-office department, was not appointed or recognized by it, and was in no way under its direction or control. The conclusion of the court was therefore predicated upon the recognized

[16](C. C. A. 1902) 117 Fed. 434, 54 C. C. A. 608.

[17](1902) 118 Iowa, 423.

rule that superior postal officers are not liable for the negligence or default of inferior officers or agents of the department, but only for their own personal negligence or default in the discharge of their duties. The postmaster cases were cited, and the cases of *Sawyer* v. *Corse* and *Central R. & B. Co.* v. *Lampley,* hereinbefore considered, were said to be unsound.

In the Iowa case, which approved in general the result reached by the Circuit Court of Appeals, the reasoning was substantially as follows: First, the duties of the railroad company in carrying the mails under contract with the post-office department are only those created by statute or arising out of the contract, and the company owes no duty and incurs no liability in the performance of such contract to the owner of mail-matter which is being transported. Second, the railroad company is not a bailee of matter which in the course of transportation is in the custody and control of a mail agent. Third, the company in the performance of its contract is discharging a public function, and is therefore a public officer not liable for the negligence or default of a subordinate officer or agent of the department. The court's conclusion was that the doctrine of *respondeat superior* does not apply in such a case. The postmaster and postal carrier cases were cited, without reference to the conflict of authority as to the liability of a carrier of the mails for the default of his private servants.

In neither of these cases is there a discussion of possible tort liability entirely distinct from the liability assumed by contract or arising out of the undertaking to discharge a public function under the authority of the post-office department. The *"Winkfield"* case is not noticed, as it seems not to have occurred to either court to consider the question whether, in analogy to that case, if one railroad company negligently operating its train so as to destroy mail-matter carried in the train of another railroad should be held liable to the owner of such mail-matter on the broad rules of tort liability, the railroad engaged in transporting such mail should not on similar principles be subject to the same liability.

These cases have not escaped adverse comment, though it can hardly be said that a conflict of authority as to the exact question has yet arisen. In *Barker* v. *Chicago, etc., Ry.,*[18] the Supreme Court of Illinois had before it the question whether a postal clerk, injured through the negligence of a railroad company in operating the train on which the plaintiff was engaged in the discharge of his duties, could recover damages for such injuries. In answer to the

[18] (1909) 243 Ill. 482.

contention that the company was a governmental agency performing a public function and not therefore liable for the negligence of its employees, the court expressed the view that the company was not a public officer or agent but a contractor with the government for the performance of a special service, and that the same reason does not exist for holding it exempt from liability for the negligence of its servants, as for holding the postmaster-general or a postmaster exempt from liability for the defaults of those who act under him in the public service as agents of the government; and the court cited with approval the cases of *Sawyer* v. *Corse* and *Central R. & B. Co.* v. *Lampley.* It cited as contrary to these cases, and in connection with *Conwell* v. *Voorhees* and *Hutchins* v. *Brackett,* the two cases from the Circuit Court of Appeals and the Supreme Court of Iowa, above commented upon, and disapproved of the theory therein adopted.

The history of the evolution of this interesting question would not be complete without reference to the case of *United States* v. *Atlantic Coast Line R. R.*,[19] recently decided in the United States District Court for the Eastern District of North Carolina. In a collision between two trains of the defendant railroad, due to the negligence of its employees, a mail car forming a part of one of the trains and the mail-matter carried therein were destroyed by fire. The action was brought by the United States to recover damages for the loss of certain registered mail-matter in such car, consisting in part of a package containing diamonds in course of transmission by mail from the sender in France to its destination in Cuba. If there had been any controversy as to whether the package containing the diamonds was in fact in the mail car destroyed, the evidence that many diamonds had been found and carried away by persons who raked over the ashes of the car would no doubt have been quite persuasive. But it appeared that, by the postal convention between France and the United States, diamonds were not mailable matter; and the court reached the very reasonable conclusion that, since the owner could not have sued for the diamonds, the United States, suing in behalf of the owner, was limited to that recovery which would have been available to the owner,—with the result that, as the diamonds were never accepted for transportation by mail, no liability as to such transportation was assumed by the railroad company undertaking in this country to carry mail-matter only and having no knowledge that property of value other than mail-matter was included in the

[19] (D. C. 1913) 206 Fed. 190; affirmed (C. C. A. 1914) 215 Fed. 56.

mail pouches. But, with reference to the right of the United States to sue in behalf of the owner of letters and packages lost through the negligence of a contracting carrier, the court made some observations which may well be noted. Cases in a Circuit Court of Appeal and in Circuit Courts of the United States were cited in which it has been held that the United States is a bailee of letters and parcels consigned to the mails for transportation, with the result that in an action against an officer or agent of the department under bond, the United States may recover against the bondsmen the value of the articles wrongfully abstracted by such officer from the mail, without regard to any question as to liability of the government to such owner or the measure of such liability.[20] But the court, although noting the possibility of a tort liability on the part of the contracting carrier of mails to the owner of the mail-matter lost or destroyed by negligence, cites with approval the cases of the *Boston Insurance Co.* and the *Banker's Mutual Casualty Co.*, as though they were conclusive on that question and merely applications of the English postmaster-general cases, thus missing entirely the thought of a distinction with reference to tort liability between a postal officer sued for the wrong of a subordinate postal officer and that of a contracting carrier sued for the tort of his private servant.

Something should be said perhaps as to the suggestion in *Boston Insurance Co.* v. *C. R. I. & P. R. Co., supra,* that a railroad carrying mail-matter transported in locked bags in charge of postal officers has no knowledge or means of knowledge as to its value, and should not be liable therefor, even though lost by the negligence of its servants. That this reason for exemption from liability is not controlling may be illustrated by what is said in *United States* v. *Atlantic Coast Line R. R.,* above considered. In that case it was well said that, since the diamonds were not mailable, and since neither the postal authorities nor the railroad had knowledge or could be charged with notice of their presence in the mail, they were never accepted for transportation. But the court seemed to think that the failure in some way to advise the postal authorities and the railroad that the contents of the package was of exceptional value, was in itself sufficient to relieve the railroad from liability, on the theory that if the nature of the articles had been disclosed special precaution for safety would have been adopted and a higher charge exacted. In the case of *Gibbon* v.

[20]National Surety Co. *v.* United States (C. C. A. 1904) 129 Fed. 70; United States *v.* American Surety Co. (C. C. 1907) 155 Fed. 941; United States *v.* American Surety Co. (C. C. 1908) 161 Fed. 149.

*Paynton*,[21] from which the court made a quotation, Lord Mansfield was careful to base his decision that the carrier was not liable for the loss of money hidden in some hay in an old bag delivered for transportation, upon a finding of affirmative fraud on the part of the sender. The suggestion in *Southcote's Case*,[22] that delivery for safe keeping of a locked chest containing goods did not charge the bailee with regard to the goods, has not been followed. In determining the liability of a passenger carrier for the contents of the passenger's trunk, the test is not whether the carrier has been advised or had notice of the extraordinary value of articles contained in the trunk, but whether such articles are of the class or character which may be so carried, that is, baggage.[23] On similar reasoning, a safety deposit company is held liable to one who rents a box in its vaults for the negligent loss of the contents of such box, although it has no means whatever of knowing the exceptional value of such contents.[24] The rule, not only as to carriers, but as to all persons who undertake to render a service in the transportation or keeping of property intrusted to them, seems to be that, in the absence of fraud tending to mislead the custodian into assuming a risk which could not have been anticipated, the custodian is chargeable with the value of the contents of a box or package or parcel, although locked or sealed, if such contents are of the general character of goods intended to be accepted. If the custodian does not wish to rely upon the general character of the box or package as an indication of the contents, he must make inquiry or limit his liability by some form of special acceptance. It would seem clear that a railroad accepting mail for transportation cannot complain of want of notice of special character or value of the contents of the mail bags, if they contain only such articles as may lawfully be sent in that manner.

It is suggested therefore, in conclusion, that the question of the liability of a contract carrier of mails to the owner of mail-matter lost or destroyed through the negligence of the servants of such contractor, who are in no sense employees of the postal department, has not yet been adequately discussed by the courts, and that the negative answer given in the two cases on the subject, as above cited, is far from satisfactory.

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[21](1769) 4 Burr. 2298.
[22](1600) 4 Coke, 83.
[23]Railroad *v.* Fraloff (1879) 100 U. S. 24.
[24]National Safe Deposit Co. *v.* Stead (1911) 250 Ill. 584.